Petition

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81-794

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

E. P. PERINI, Superintendent
Marion Correctional Institution,

Petitioner,

v.

JACK L. LINTON.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

RICHARD DAVID DRAKE
Counsel of Record

SIMON B. KARAS
LIANNE L. SANTELLANI
Assistant Attorneys General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

QUESTION PRESENTED

Whether the right to counsel of choice is a guaranteed right under the Sixth Amendment, such that withdrawal by retained counsel, after a denial of a continuance, constitutes an infringement of the right, so as to warrant habeas corpus relief, absent any requirement of showing that defendant was prejudiced by the loss of retained counsel.

PARTIES

The petitioner in this action is E. P. Perini in his capacity as Superintendent of the Marion Correctional Institute at Marion, Ohio. The respondent is Jack L. Linton.

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DECISIONS BELOW

The decision of the United States Court of Appeals For the Sixth Circuit is, as of yet, unreported. **Linton v. Perini,** _____F.2d._____, (6th Cir. 1981) (A-1) The decision of the United States District Court for the Northern District of Ohio, Western Division, is unreported. (A-13) The decision of the Ohio Court of Appeals for the Ninth Judicial District is unreported. (A-32).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on July 24, 1981. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment VI to the Constitution of the United States:

> AMENDMENT VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

E. P. PERINI, Superintendent
Marion Correctional Institution

Petitioner,

v.

JACK L. LINTON,

Respondent.

STATEMENT OF THE CASE

Respondent Jack L. Linton was indicted by the May 1978 Term of the Summit County, Ohio, Grand Jury on four (4) counts of rape in violation of Section 2907.02, Ohio Revised Code, and on one (1) count of kidnapping in violation of Section 2905.01, Ohio Revised Code.

Arraignment on the indictment was held on May 8, 1978 before the Court of Common Pleas, Summit County, Ohio.

Respondent plead not guilty to the charges in the indictment. Pre-trial was then scheduled for May 15, 1978, and trial was scheduled for May 18, 1978. At the arraignment, respondent's retained counsel, Angelo Fanelly, requested that the trial judge schedule trial for early June instead of May 18th.

The following colloquy occurred among Attorney Fanelly, the prosecutor, respondent, and the trial judge:

> MR. FANELLY: If it please Your Honor, on behalf of the Defendant, we wish to acknowledge receipt of the Indictment; that he has read and fully understands the

same; waives the reading thereof and any defect thereon and respectfully ask the same bond continue.

THE COURT: Mr. Linton, have you read this Indictment?

DEFENDANT LINTON: Yes, I have.

THE COURT: Have you, do you understand that?

DEFENDANT LINTON: Yes.

THE COURT: Do you wish the Court to read it to you?

DEFENDANT LINTON: No. That won't be necessary.

THE COURT: To these charges your attorney has entered a plea of not guilty for you. Is that your desire?

DEFENDANT LINTON: Yes.

THE COURT: You are out on bond?

DEFENDANT LINTON: Yes.

THE COURT: When do you want this set?

MR. ZUCH: As soon as possible, Your Honor, for pretrial and trial.

THE COURT: Do you have the time to pretry it this morning?

MR. ZUCH: Yes, we can pretry it this morning.

THE COURT: Why don't you go ahead and pretry it and then I will get a date.

MR. FANELLY: Your Honor, I am not in a position to pretry this today. I haven't even filed my motion for discovery.

THE COURT: He is going to give it to you right now.

MR. ZUCH: Yes.

MR. FANELLY: I have other things to do, Your Honor. I have got another matter I have got to attend. I have got people in the office at 10:00 o'clock.

MR. ZUCH: Maybe we can do it in the middle of the week.

MR. FANELLY: How about the pretrial next Monday morning, a week from today.

The 15th Judge; is that all right?

THE COURT: We will have this case pretried next Monday morning at 9:00 a.m. and set the trial date down for the 18th at 9:00 a.m.

MR. FANELLY: I'm sorry, Your Honor, I am not available.

THE COURT: You can have the 18th or the 19th. The Court is free.

MR. FANELLY: I have other matters that week, Judge, and wouldn't be available til (sic) the first week of June.

THE COURT: Except for one thing. The law says that criminal cases shall have priority. The Court will give you the 18th or the 19th. That is the only two days that I have.

MR. FANELLY: Well, then, I will withdraw from this case. He can hire someone else. No way I can get ready in two weeks' time. You can either appoint someone else or he can hire someone else. No way I can.

THE COURT: Are you addressing the Court? Just stand up here til I make a ruling. (sic) We are not playing to the gallery.

MR. FANELLY: I'm sorry.

THE COURT: You may withdraw any time you want to. This Court runs this court room in accordance with the law and in accordance with procedure. You or any other attorney may not like it.

The Court will allow you to withdraw and instructs you (indicating) to get your own lawyer and he will be ready to go on the 18th of May.

DEFENDANT LINTON: Your Honor, can I — —

THE COURT: Yes.

DEFENDANT LINTON: I cannot retain another lawyer. I have just managed to get out on bail with my parents' help and everything, and – –

MR. FANELLY: Excuse me. I haven't been paid anything up to this point.

THE COURT: I understand that. The Court is not concerned about payment. If you want to withdraw you have a right to withdraw.

DEFENDANT LINTON: But that is forcing me to retain a new layer. I have been out on bond. I have been pulled back in. Bond was raised. I feel persecuted. I am not saying I am, but – –

THE COURT: No. The Court is giving you, here is the situation; if you are not guilty of anything, the best way to prove your innocence is to get to trial immediately so that the world will know you are not guilty.

DEFENDANT LINTON: But I don't have the time. I have to pay this man something. I am working and I am paying my paychecks, when I get it. I haven't even given him the first retainer yet, and I am doing the best I can.

THE COURT: He has asked to withdraw.

DEFENDANT LINTON: He is being forced to withdraw.

THE COURT: Nobody is forcing him to withdraw. He is withdrawing of his own volition.

DEFENDANT LINTON: Okay.

THE COURT: I don't make any exceptions for this case. Every case I get, I set it for ten days at the time of the arraignment and you are no different from anybody else and I am giving you two weeks.

Now, if Mr. Fanelly wants to withdraw that is he prerogative, but you be ready to go next Monday for the pretrial at 9:00 a.m. and number two, you will go to trial on the 18th. Now, the rest is up to you.

Next case.

Attorney Fanelly stated that he had other obligations and could not properly prepare for a trial held on May 18th. The trial judge refused to reschedule the trial date. Consequently Attorney Fanelly withdrew as respondent's counsel. On the same day the trial court appointed Attorney Robert Bulford, to represent respondent.

On the morning of trial, May 18, 1978, Attorney Bulford requested a continuance. Although this motion was denied, the court postponed the trial date until May 22nd enabling the Court to complete a current trial.

Trial commenced on May 22nd, fourteen days after the initial arraignment on the indictment with Attorney Bulford as counsel. On the first day of the trial, May 22nd, voir dire and opening statements were held. The testimony of the witnesses was taken on the second day, May 23rd. Neither respondent nor his co-defendant testified.

The state's evidence showed that the victim, a sixteen (16) year old schoolgirl, was sexually accosted by the co-defendants while walking through a parking lot on

her way to school. The state's witnesses were the victim and an acquaintance whom she saw shortly after she was released, and to whom she related what had occurred.

The defendants' witnesses were a gas station operator and a detective. Through their testimony, the defendants sought to establish that the victim had an opportunity to leave the company of the defendants voluntarily. This would have established that the victim had consented to the activities forming the basis for the conviction. On May 24th the jury returned a verdict of guilty on the one count of kidnapping and three counts of rape. Respondent was sentenced to a period of seven (7) to twenty-five (25) years of incarceration.

The Ohio Court of Appeals for the Ninth Judicial District affirmed the judgment on December 29, 1978. (A-33) The Supreme Court of Ohio denied leave to appeal on April 26, 1979.

Respondent then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. That Court's Magistrate made a report on September 19, 1980 recommending that the petition be dismissed. (A-15) No evidentiary hearing was held. However, affidavits from Attorneys Fanelly and Bulford were submitted. The Magistrate found that the State had not met its burden of showing that the denial of the continuance was reasonable, and that respondent had established a denial of his constitutional right to be represented by counsel of his own choice. The Magistrate, however, concluded that respondent had not met his burden of establishing prejudice as a result of the trial court's deprivation of his right to representation by counsel of his own choice. The recommendation of the Magistrate that the writ be denied was adopted by the District Court on October 22, 1980. (A-13).

On appeal to the United States Court of Appeals for the Sixth Circuit the judgment of the District Court was reversed and the case remanded with instructions to release respondent unless a new trial is commenced within one hundred twenty days of the mandate of the Court. (A-1)

The Court of Appeals found that:

> [E]very person has a constitutional right to retain at his own expense his own counsel so long as that right does not unreasonably interfere with the normal progress of a criminal case. The state may not arbitrarily interfere with this right in the name of docket control. Evidence that a defendant was denied this right arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice. (A-10)

The Court further found that the request for a continuance made by Attorney Fanelly was reasonable. In denying the request and forcing retained counsel to withdraw, the trial judge violated respondent's right to retain counsel of his own choosing and the circuit court held that no showing of prejudice was required. (A-11).

Petitioner's motion to stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure was granted. This petition for a writ of certiorari has followed.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

WHETHER THE RIGHT TO COUNSEL OF CHOICE IS A GUARANTEED RIGHT UNDER THE SIXTH AMENDMENT, SUCH THAT WITHDRAWAL BY

RETAINED COUNSEL AFTER A DENIAL OF A CONTINUANCE, CONSTITUTES AN INFRINGEMENT OF THE RIGHT, SO AS TO WARRANT HABEAS CORPUS RELIEF, ABSENT ANY REQUIREMENT OF SHOWING THAT DEFENDANT WAS PREJUDICED BY THE LOSS OF RETAINED COUNSEL.

This case presents an important constitutional question of the extent that the Sixth Amendment right to counsel of choice interacts with the discretion of a trial judge in denying a motion for continuance. In addition, the question further evolves to whether the defendant is required to show that he was prejudiced by the withdrawal of his retained counsel, where subsequent counsel was immediately appointed, absent a showing that appointed counsel did not render effective assistance of counsel.

In this case, respondent's retained counsel withdrew after his request at the arraignment, that the trial date be continued, was denied. Respondent was indicted pursuant to the career criminal program effective in Ohio as described in **State v. Lamp**, 59 Ohio App. 2d 125 (1977). (A-32) This program provides for the expedited trial of persons who by their past criminal histories have demonstrated a substantial risk to the community if allowed to remain at liberty while on bond. Immediately after respondent's retained counsel withdrew, pursuant to a request by respondent, the trial court appounted counsel to represent him. The case went to trial fourteen days from the appointment of the second counsel.

The Sixth Circuit Court of Appeals held in this case that the denial of the continuance by the trial judge, and the subsequent withdrawal of his retained counsel, violated respondent's Sixth Amendment right to counsel of his choice. Furthermore, the Court held that a showing of prejudice was not required even where there was sufficient time to prepare the case and no showing had been made that the second counsel could have done anything more to prepare.

The Magistrate's report details the lack of even a modicum of prejudice to the respondent. The respondent, through the affidavit of his appointed counsel, failed to show that he was foreclosed from offering any evidence, producing any witnesses, or advancing any defenses as a result of the denial of the request for continuance. In addition, the particulars of this case were not complex. Although involving four felony counts, the case arose from the rape and kidnapping of a sixteen (16) year old girl. Only four witnesses were presented at trial; the victim, a friend of the victim, a detective, and a gas station attendant.

The Magistrate found that where a denial of a continuance results in retained counsel withdrawing, the state must demonstrate the reasonableness of the trial court's actions. Where the state fails to prove the reasonableness of the denial of continuance, the defendants must show prejudice resulting from the denial. The Sixth Circuit Court of Appeals has presented a *per se* rule where retained counsel has withdrawn, even without, as in this case, a scintilla of prejudice resulting from the withdrawal of retained counsel.

The instant case presents an important issue of constitutional law regarding a defendant's Sixth Amendment right to counsel of choice in view of this Court's decision in **Ungar v. Sarafite**, 376 U.S. 575 (1964). In

Ungar this Court considered the matter of continuance under a due process analysis. The Court said:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied . . . *Id.* at 589.

It is axiomatic that in all criminal prosecutions the accused enjoys the right to have the assistance of counsel for his defense. **Gideon v. Wainwright**, 372 U.S. 335 (1963). Implicit in this guarantee is the right to be represented by counsel of one's own choice. **Powell v. Alabama**, 287 U.S. 45 (1932). Although the right to choose one's own counsel is an essential component of the Sixth Amendment, it is also true that a trial court has a formidable task in the administration of justice. The trial court must operate in such a manner so as to protect society's interest in a prompt, effective, and efficient administration of justice.

The instant case presents an ideal situation for this Court to finally clarify the extent that a defendant may enjoy the right to counsel of choice when in conflict with a court's discretionary powers of administration. As stated in **Gandy v. State of Alabama**, 569 F.2d (5th Cir. 1978),

> This panel is bound by a prior panel's decision in the absence of intervening *en banc* reconsideration or Supreme Court precedent. at 1325 n. 11.

In addition to the prevailing confusion among the circuits regarding the extent of a Sixth Amendment right to counsel of choice, there exists no clear statement concerning the requirement, if any, of a showing of prejudice by the abridgement of any right to counsel of choice.

Most of the circuits in reviewing the issue of the Sixth Amendment right to counsel of choice have dealt with situations involving a late appointment or substitution of counsel. Dealing with such scenarios, the circuits have found a denial of effective assistance of counsel collateral to the abridgement of the right to counsel of choice. However, in this case, the Court of Appeals for the Sixth Circuit determined that no prejudice need be shown. The right to counsel of choice was violated *per se* by the denial of the request for continuance by the trial judge, and the subsequent withdrawal by counsel, even though no attorney-client relationship was violated, nor was the immediately appointed counsel unable to pursue any action that retained counsel would have pursued.

Where allegations of ineffective counsel due to belated appointments are asserted, a determination of prejudice to the defendant is made in deciding whether counsel was ineffective. However, where retained counsel withdraws, and alternate counsel is immediately appointed, it appears that no showing of any prejudice by the acts or omissions of appointed counsel need be made.

This situation certainly has the potential to create chaos with the court's discretion in calendar control. It must be noted that not every request for continuance should be granted. It is possible that some counsel may abuse the procedure and withdraw from the case when a continuance is denied. In addition, society has an interest in having defendants brought to trial quickly in

order to reduce the potential for other crimes being committed while these defendants are out on bail awaiting trial.[1] To provide that a defendant's right to counsel of choice is so absolute so as to not require any showing of prejudice opens a Pandora's box to be handled by the trial courts.

The proper exercise of the trial court's discretion requires a delicate balance between the defendant's rights and the societal interests of effective and efficient administration of justice. To permit a continuance to accommodate one defendant may, in itself, prejudice the rights of other defendants whose trials are delayed by the continuance granted to the first defendant. Taken to the extreme, the entire system could quickly lose any semblance of orderly administration. The trial court must balance the conflicting demands of court administation with the rights of the accused, whether involved in the case before the court or awaiting trial in another case which may be affected as a consequence of the dealy. As relevant to this case, it should be noted that Ohio has a strict rule requiring that defendants be brought to trial within ninety days. *See,* Section 2945.71 of the Ohio Revised Code.

In cases where this Court has held that a showing of prejudice was irrelevant when the right to counsel was denied, either no counsel was provided or counsel was prevented by the court from fulfilling normal functions. In **Gideon v. Wainwright,** *supra,* no defense counsel was appointed. In **Geders v. United States,** 425 U.S. 80 (1976), the court prohibited counsel from consulting

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1. This is particularly the case where, as here, the defendant represents a demonstrated high risk to society. Career Criminal Programs such as that initiated in Ohio are expressly intended to minimize the pre-trial danger which such defendants pose to the community. **State v. Lamp,** *supra.*

with his client during an overnight mid-trial recess. In **Herring v. New York**, 422 U.S. 853 (1975), a state statute allowed the trial judge to prohibit defense counsel from making a summation. In **Holloway v. Arkansas**, 435 U.S. 475 (1978) the court required defense counsel to represent defendants with conflicting interests. In **Powell v. Alabama**, *supra*, the court did not provide defense counsel with adequate opportunity to consult with defendants and prepare for trial. In **Leis v. Flynt**, 439 U.S. 438 (1979) this Court held that there was no absolute right to counsel where counsel was not admitted in the jurisdiction of the court.

This Court has not established precedent where the right to counsel of choice may have been violated but arrangements were immediately made for other competent counsel. Although the Court of Appeals for the Sixth Circuit speculated that fourteen days was not sufficient preparatory time, the court found even in the absence of any showing of prejudice to the respondent, his right to counsel of choice warranted the granting of habeas corpus relief.

Pursuant to **Ungar**, where a denial of a continuance results in a short period of time between the first appearance and the trial, and counsel continues to represent the defendant, the defendant must show prejudice resulting from the alleged ineffective assistance of counsel due to minimal preparatory time. However, where the denial of the continuance leads to the withdrawal by retained counsel, the newly appointed counsel should also fall within the guidelines of **Ungar**; to wit: demonstrate a prejudice resulting from the minimal preparatory time. Since there is no *per se* rule requiring reversals in situations of late appointments, there should also be no *per se* rule requiring reversals where counsel of choice withdraws. *See*, **Chambers v. Maroney**, 399 U.S. 42 (1970). Some element of prejudice should be demonstrated. To allow a *per se* rule requiring reversals where counsel of choice withdraws would open the way

for a multitude of cases in habeas corpus where a continuance was denied. A showing of some indicia of prejudice must be required.

In addition to clarifying the situation as interpreted through **Ungar**, this case presents the opportunity for this Court to settle the conflict arising among the various circuits. For example, in **United States v. Burton**, 584 F.2d 485 (D.C. Cir. 1978) the right to counsel of choice was related to adequate time to prepare. In listing factors to be considered, the court found the existence of prejudice was only one factor of many listed, and not a prerequisite to a Sixth Amendment violation. In **Releford v. United States**, 288 F. 2d 298 (9th Cir. 1961) prejudice was presumed where a complete disregard of the defendant's right to choose counsel existed.

Where retained counsel was replaced by an associate who was unfamiliar and unprepared, the court in **Gandy v. Alabama**, *supra*, based the violation of the right to counsel of choice upon ineffective assistance of counsel. In a prior case of **Giacalone v. Lucas**, 445 F.2d 1238 (6th Cir. 1971), the Court of Appeals for the Sixth Circuit considered prejudice as but one factor in balancing the right to counsel of choice with other competing concerns.

It is of nationwide importance that this Court resolve the division of opinion in the lower circuit courts.

CONCLUSION

Considering that the different circuits are approaching the conflict between the right to counsel of choice and the court's discretion in denying continuances from many different angles, petitioner urges this Court to grant this petition for a writ of certiorari. In addition to the apparent confusion, this case presents a substantial constitutional question in a unique manner which has far reaching policy considerations. Secondary to the initial issue is the need for resolution by this Court of the requirement, if any, for a showing of prejudice by a defendant whose right to counsel of choice was denied by the court in the administration of justice.

Due to the substantial constitutional question presented and the impact upon the orderly administration of the judicial system, certiorari should be granted in order to resolve this issue of national importance.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

RICHARD DAVID DRAKE
Counsel of Record
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari has been served on respondent, Jack Linton, by forwarding such copy through the office of his counsel, J. Tullis Rogers, Ohio Public Defender's Office, Elizabeth Manton, Assistant Ohio Public Defender, 20 East Broad Street, Columbus, Ohio 43215, by U.S. Mail, post paid this date of _____, 1981. I further certify that all parties required to be served have been so served. Respondent's address is Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302.

RICHARD DAVID DRAKE
Assistant Attorney General

APPENDIX

Page

Opinion, July 24, 1981 United States Court of Appeals for the Sixth Circuit, **Linton v. Perini,** _____F.2d_____, (6th Cir. 1981) reversing district court. A-1

Judgment and Order, October 22, 1980 United States District Court for the Northern District of Ohio, Western Division dismissing petition for writ of habeas corpus and adopting Magistrate's Report and Recommendation A-13

Magistrate's Report and Recommendation, September 22, 1980, United States District Court for the Northern District of Ohio, Western Division recommending the petition for writ of habeas corpus be dismissed A-15

Decision, December 29, 1978, Ohio Court of Appeals for the Ninth Judicial District affirming the conviction A-32

No. 80-3764

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JACK L. LINTON,
Petitioner-Appellant,

v.

E. P. PERINI, Superintendent,
Respondent-Appellee.

Decided and Filed July 24, 1981.

APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Before: WEICK and MERRITT, Circuit Judges, and GILMORE, District Judge.*

GILMORE, District Judge. This is an appeal from the denial of a habeas corpus petition. Petitioner-appellant claims he was denied the right to select counsel of his own choice in a criminal trial, and also was denied effective assistance of counsel. We find that he was denied the right to employ counsel of his own choosing without a sufficient reason, and therefore reverse.

Appellant was arraigned in the Ohio Common Pleas Court on five felony counts (one of kidnapping and four of rape) on May 8, 1978. He was represented by retained counsel, Angelo A. Fanelly, and pled not guilty. Pretrial was scheduled for May 15, 1978, and trial for May 18, 1978. At the arraignment, Fanelly, appellant's retained counsel, requested that the trial judge schedule trial for early June rather than May 18. He stated he had other obligations and could not properly prepare for trial on

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*Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

May 18.[1] The trial judge refused to reschedule the trial date over appellant's objections. At that point, Fanelly withdrew. The Court allowed the withdrawal and instructed appellant to hire another lawyer for the trial ten days hence, on May 18.

On the same day, appellant stated that he could not obtain counsel and the trial court appointed Robert Bulford to represent him. Bulford immediately moved for a continuance, claiming he needed more time to prepare the case for trial. This motion was denied by the Court. On the morning of trial, May 18, Bulford again requested a continuance so that appellant's original retained counsel could resume his representation. This motion was denied, but the court did move the trial date to May 22 because of the court's own scheduling problems. Trial commenced with Bulford as counsel on May 22, and on May 24 the jury returned a verdict of guilty on four of the five charges. Appellant was eventually sentenced to a period of incarceration of from seven to 25 years. The Ohio Court of Appeals affirmed the judgment on December 29, 1978, and the Supreme Court of Ohio denied leave to appeal on April 26, 1979.

Appellant then brought this habeas corpus proceeding in the United States District Court for the Northern District of Ohio. That Court's Magistrate made a detailed report on September 19, 1980, recommending that the petition be dismissed. This recommendation was adopted by the District Court on October 22, 1980, and the matter is here on appeal.

In his opinion, the District Court Magistrate held that the State had not met its burden of showing that the

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1. In his affidavit, Mr. Fanelly stated that:

> "I could not properly or adequately defend Mr. Linton on such serious charges in a period of approximately three weeks. There were witnesses to cover, discovery, etc."

denial of the continuance was reasonable, and that appellant had established a denial of his constitutional right to be represented by counsel of his own choice. The Magistrate, citing **Giacalone v. Lucas**, 445 F.2d 1238 (CA6 1971), however, concluded that appellant had not met his burden of establishing prejudice as a result of the trial court's deprivation of his right to representation of counsel of his choice, and therefore recommended that the writ be denied. This recommendation was adopted by the District Court.

It is axiomatic that in all criminal prosecutions the accused enjoys the right to have assistance of counsel for his defense,[2] and implicit in this guarantee is the right to be represented by counsel of one's own choice. **Powell v. Alabama**, 287 U.S. 45; 53 Sup. Ct. 55 (1932). In **Chandler v. Fretag**, 348 U.S. 3 (1954), the Court said:

> ". . . defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth. . . . By denying petitioner any opportunity whatever to obtain counsel in the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment." *Id.* at 10

The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.

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2. **Gideon v. Wainwright**, 372 U.S. 335 (1963).

It is also true that a trial court, acting in the name of calendar control, cannot arbitrarily and unreasonably interfere with a client's right to be represented by the attorney he has selected. On the other hand, the right to counsel of choice may not be used to unreasonably delay trial.

When a defendant's chosen counsel represents that he cannot meet a set trial date and requests a continuance, a trial court considering such a request must be sensitive to the defendant's right to counsel of his choice, as well as the public's interest in prompt and efficient administration of justice. If the court finds that the delay is an attempt to manipulate a trial, or causes prejudice to the prosecution, or creates diffculties for the trial court, the trial court may interfere with the defendant's right to counsel of his own choice and require the case to proceed. On the other hand, where the request is reasonable, where there have been no prior adjournments, where the length of delay is moderate, and where the adjournment seems to be for legitimate reasons, the court should allow a reasonable adjournment to permit a defendant to have retained counsel of his own choice.

This does not mean that a trial court cannot tightly control its own docket, or that its assignment of cases can be manipulated by defense counsel and defendants. A court must always keep control of its own docket, but in doing so it must be reasonable and consider the constitutional right of a defendant to have retained counsel of his choice.

A leading case on the subject is **United States v. Burton**, 584 F.2d 485 (CA D.C. 1978). There the court held that the right to retain counsel of one's own choosing is not absolute, and where a continuance is sought to retain or replace counsel, the right to select counsel must be carefully balanced against the public's interest in the orderly administration of justice. It also held that what is a reasonable delay for securing

additional counsel, once adequate counsel has been obtained, depends upon all of the surrounding facts and circumstances. The Court said, inter alia:

> ". . . An essential element of the Sixth Amendment's protection of the right to assistance of counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing. As the Supreme Court stated in Powell v. Alabama, 287 U.S. 45; 53 Sup. Ct. 55; 77 L. Ed. 158 (1932) '[I]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair apportunity to secure counsel of his own choice.' 287 U.S. at 53; 53 Sup. Ct. at 582. An accused who is financially able to retain counsel must not be deprived of the opportunity to do so.
>
> "Yet the right to retain counsel of one's own choice is not absolute. The right 'cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same.' The public has a strong interest in the prompt, effective, and efficient administration of justice; the public's interest in the dispensation of justice that is not unreasonably delayed has great force." *Id.* at 488, 489.

The Court went on to point out that the right of choice of counsel is related to the right to adequate time to prepare for trial. It emphasized that counsel is not entitled to unlimited preparation time, but only to

reasonable preparation time. It also found a due process right to counsel of one's choice, as well as a Sixth Amendment right.

Commenting on the factors to be considered in determining reasonable delay, the Court held:

> "What is a reasonable delay necessarily depends on all the surrounding facts and circumstances. Some of the factors to be considered in the balance include: the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether defendant has other competent counsel prepared to try the case, including the consideration of whether other counsel was retained as lead or associate counsel; whether denying the continuance will result in an identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case." *Id.* at 490, 491.

Burton found the existence of prejudice as only one of a number of factors to be considered in balancing the interests of the criminal defendant with other considerations such as the interest in orderly procedure and the interest in avoiding manipulation of the judicial process.

> "The question . . . is whether appellant was afforded his constitutional right to select his own counsel. In determining whether the right was violated, the existence of prejudice is only one of the factors to consider. *The existence of prejudice to the case is not a prerequisite to a constitutional violation in this context . . .*"
> (Emphasis added) *Id.* at 498

In **Ungar v. Sarafite**, 376 U.S. 575 (1964), the Court considered the matter under a due process analysis. It said:

> "The matter or continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence. . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. . . . *There are no mechanical tests* for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . ." (Emphasis added) *Id.* at 589

The Sixth Circuit has addressed the matter. A leading case is **United States v. Johnston**, 318 F.2d 288 (CA6 1963). There the accused was told on Friday that the counsel he had employed could not appear for him at trial but that the counsel's associate would try the case.

The accused objected to this but was required to go to trial on the following Tuesday, represented by associate counsel who was not of his own choosing. The court held that the defendant was deprived of a fair opportunity and a reasonable time to select his own counsel, in violation of the Sixth Amendment. Discussing the issue, the court said:

> "The Amendment does not concern itself with who the counsel may be or how the counsel may be selected. But if a defendant in a criminal case desires to hire his own counsel, in order that the object of the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing. . . .
>
> "Therefore the question boils down to whether appellant Balk had fair apportunity and a reasonable time to select a counsel of his own choice.
>
> * * *
>
> *". . . Actually it seems to us that appellant Balk was not prejudiced by the action of the District Judge in this respect, but this situation does not satisfy appellant Balk's rights under the Sixth Amendment. . . .*
>
> "The weekend, from Friday until Tuesday, was not a reasonably sufficient time to give appellant Balk fair opportunity to select and employ counsel of his own choosing. We, therefore, rule that appellant Balk was deprived of a fair opportunity and a reasonable time to select his own counsel.

> ". . . the case will have to be returned to the District Court as to appellant Balk, . . ." (Emphasis added) *Id.* at 291

The Sixth Circuit also considered the issue in **Giacalone v. Lucas**, 445 F.2d 1238 (CA6 1971). There the Court held that the refusal of the state trial court to grant a continuance under the facts was not improper and not a denial of due process. It recognized the authority of **Johnston**, but distinguished it upon the facts. It recognized fully the constitutional status of the selection of one's own counsel, and set forth the factors to be considered in determining the reasonableness of a delay.

Significantly, **Giacalone** also considered prejudice as *one* factor in balancing the criminal defendant's Sixth Amendment right to counsel of choice with the other competing concerns where the court stated:

> *"In addition,* we do not lose sight of the fact that the real issue here is whether Messrs. Barris and Fink properly and competently represented the Appellant. (Emphasis added) **Giacalone** at 1243

The foregoing statement in **Giacalone** has been read by the appellee to overrule **Johnston** and require that the criminal defendant prove that he was prejudiced. Such is not the law. **Giacalone** involved facts strongly indicating a contrivance on the part of defense counsel in the case. **Giacalone** carefully distinguished **Johnston** on its facts, thereby preserving **Johnston's** essence.

Other cases involving the balancing of the trial judge's discretionary power to deny continuances and Sixth Amendment right to counsel of choice include **United States v. Leavitt**, 608 F.2d 1290 (CA9 1979); **Gandy v. Alabama**, 569 F.2d 1318 (CA5 1978); **United States v. Inman**, 483 F.2d 738 (CA4 1973).

In the instant case, defendant was forced to go to trial with an attorney appointed by the court after he had been able to retain his own attorney who could not prepare the case in the ten days allowed by the trial court. The criminal case involved five serious felony counts and the basic issue was the credibility of the witnesses.

Where, as in this case, there is no guilty plea, no disinterested eye witness to the defendant's crimes, and no confession, the determination of guilt or innocence will hinge largely upon the credibility of the complaining witness. In order for an attorney to properly investigate an alleged rape and kidnapping under these circumstances, the complainant's background must be explored and the statements of persons with whom she discussed the alleged crimes shortly after their occurrence obtained.

Defendant's appointed counsel admits that he was not able to thoroughly investigate the background of the prosecutrix and did not interview several potential witnesses. The only defense presented at trial was that of consent. In light of these facts, the Court doubts that the 10 days or 14 days afforded here were adequate. To say that appellant's attorney's modest request for more time to investigate a very serious felony case was dilatory is to stretch credulity.

Even in the absence of an evident showing of prejudice to the defendant, the facts here are sufficient to merit the reversal of the District Court.

A key consideration in the right to counsel under the Sixth Amendment is a reasonable opportunity to employ and consult with counsel. **Chandler v. Fretag,** *supra.* Every person has a constitutional right to retain at his own expense his own counsel so long as that right does not unreasonably interfere with the normal progress of a criminal case. Conversely, a state may not arbitrarily interfere with this right in the name of docket control. Evidence that a defendant was denied this right arbitrarily

and without adequate reason is sufficient to mandate reversal without a showing of prejudice. Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel.

Here, it is clear that the state trial judge acted unreasonably and arbitrarily in setting the case for trial 10 days after the arraignment, over the protest of appellant's attorney that he needed more time to prepare for the trial of these serious charges. All the lawyer asked for was a short adjournment of two or three weeks to properly prepare, and to arrange his own calendar. Defendant's retained counsel had not received any prior continuances and nothing in the record indicates that the requested continuance involved a scheme to delay the trial. There was no showing of inconvenience to the witnesses, opposing counsel, or the court. The length of the requested delay was not unreasonable. Moreover, as noted above, the case involves five serious felony counts, four for rape and one for kidnapping. Under these circumstances, counsel's request was reasonable, and in denying it and forcing appellant's retained counsel to withdraw, the trial judge violated the Sixth Amendment right of appellant to retain counsel of his own choosing.

This Court, of course, recognizes the importance of docket control and the necessity that trial judges keep a firm hand in controlling their dockets. Nothing in this opinion should be construed to suggest otherwise. But on the other hand such docket control must not be exercised in an arbitrary manner so as to deny a defendant the right to have his own retained counsel.

The Court concludes that there is a basis for the issuance of the writ in this case, and that the denial of appellant's right to have counsel retained by him represent him violated the Sixth Amendment. A short adjournment should have been given, and appellant should have been allowed to proceed with his own retained counsel.

Harmless error tests are not relevant to the instant case. In **Holloway v. Arkansas**, 435 U.S. 475 (1978), the court held that the Sixth Amendment's guarantee of the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. It said:

> "Moreover, this court has concluded that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' **Chapman v. California**, *supra*, at 23. Accordingly, when a defendant is deprived of the presence or assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic . . ." *Id.* at 489

And in a slightly different context in **Beasley v. United States**, 491 F.2d 687 (CA6 1974), the Court held:

> ". . . Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel. . ." *Id.* at 696

For the reasons given, the judgment of the District Court is reversed and the case is remanded with instructions to release appellant unless a new trial is commenced within 120 days of the mandate of this court.

Reversed and remanded.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

CIVIL ACTION FILE NO. C 79-493

JACK LINTON,

Petitioner,

v.

E. P. PERINI, Supt.,

Respondent.

JUDGMENT

FILED 1980 OCT 22 PM 1:57

This action came on for (hearing) before the Court, Honorable NICHOLAS J. WALINSKI, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that petition for writ of habeas corpus is dismissed.

/s/ Nicholas J. Walinski
United States District Judge

Dated at TOLEDO, OHIO, this 22nd day of October , 1980.

/s/ James S. Gallas, Clerk
Clerk of Court

/s/ Sharon K. Cichy
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C 79-493

JACK LINTON,

Petitioner,

v.

E. P. PERINI,

Respondent.

ORDER

FILED 1980 OCT 22 PM 1:57

* * *

This cause came on to be heard on petitioner's and respondent's objections to the Magistrate's Report and Recommendation filed on September 22, 1980. The Court having reviewed said Report and Recommendation, the findings and recommendations contained therein, and the record in this cause, and having considered the objections by the parties, concludes that neither the petitioner's nor respondent's objections are well taken. Therefore,

IT IS ORDERED that the Report and Recommendation are adopted as the Order of this Court. Petition for writ of habeas corpus is hereby dismissed.

/s/ Nicholas J. Walinski
United States District Judge

Toledo, Ohio.
October 21, 1980.

In conformity with Rule 77(d) F.R.C.P. please take ntoice that the following order of judgment was entered in this Court on: October 22, 1980 James S. Gallas, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

Case No. C 79-493

JACK LINTON,

Petitioner,

v.

E. P. PERINI,

Respondent.

MAGISTRATE'S REPORT AND RECOMMENDATION

FILED 1980 SEP 22 AM 8:23

Carr, Magistrate:

This is a habeas corpus case filed by a state prisoner, which has been referred for a Magistrate's Report and Recommendation. The petitioner alleges that the proceedings which resulted in his conviction for one count of kidnapping and three counts of rape were tainted by two distinct, but related, violations of the Sixth Amendment. First, he claims that his right under that amendment to be represented by counsel of his choice was violated by the state trial court judge. Second, he alleges that the denial of requests for continuances deprived him of his right to effective assistance of counsel. The parties agree that the petitioner has exhausted his state court remedies (during the direct appeal of his convictions) and that no evidentiary hearing is necessary, although the record has been supplemented by affidavits.

Upon a review of the record of the state court proceedings and the pleadings and arguments of the parties, I find that, although the petitioner's first conten-

tion is well taken (namely that he was deprived of his right to be represented by counsel of his choice), he has not made a sufficient showing of prejudice to entitle him to relief. As to the second basis for petitioner's claim for relief, I find that petitioner has not met the standard of **Callahan v. Russell**, 423 F.2d 450 (6th Cir. 1970) regarding prejudice as a result of the short time allowed for trial preparation. It is, therefore, recommended that the petition for a writ of habeas corpus be dismissed.

A. Factual Background

The incident which led to petitioner's indictment occurred on April 25, 1978. Petitioner was arrested on April 29, 1978, and posted bond shortly thereafter. On May 3, 1978, a direct indictment was returned by the Summit County grand jury, charging the petitioner with one count of kidnapping and four counts of rape.

Arraignment on the indictment was held on May 8, 1978. Petitioner appeared with retained counsel, one Angelo Fanelly. At the arraignment a colloquy, which appears at pages 3 through 7 of the arraignment transcript (copy attached as Appendix "A"), occurred between Mr. Fanelly, the petitioner and the trial judge. Thereafter, either on the same day or within two days, the court appointed Robert Bulford (a public defender) to represent the petitioner, and trial remained scheduled for May 19, 1978. On May 19, 1978, Mr. Bulford moved for a continuance to enable Mr. Fanelly to resume representation of the petitioner, but this motion was overruled.

Because the court was conducting another trial on May 19, 1978, petitioner's trial did not actually begin until May 22, 1978, fourteen days after his initial arraignment on the indictment.

The trial, at which two witnesses testified for each side, lasted for two days. On the first day, May 22nd,

voir dire and opening statements were held, and the witnesses' testimony was taken on the second day, May 23rd. Neither the petitioner nor his codefendant testified.

The state's evidence showed that the victim, a sixteen year old schoolgirl, was accosted by the codefendants while walking through a parking lot on her way to school. They took her to a rural area, where various sexual acts occurred. The state's witnesses were the victim and an acquaintance whom she saw shortly after she was released, and to whom she related what had occurred to her.

The defendants' witnesses were a gas station operator and a detective. Through their testimony, the defendants sought to establish that the victim had had an opportunity to leave their company voluntarily, which would have established that the victim had consented to the activities which formed the basis for the conviction.

The jury found the petitioner guilty of one count of kidnapping and three counts of rape. The petitioner was sentenced to a period of seven to twentyfive years.

B. Deprivation of the Petitioner's Right to Representation by Counsel of His Choice

The Sixth Amendment, which has been made applicable to the states through the Fourteenth Amendment, **Gideon v. Wainwright**, 372 U.S. 335, 342, 83 S. Ct. 792 795 (1963), provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense. Implicit in this guarantee is that the defendant "be afforded a fair opportunity to secure counsel of his own choice." **Powell v. Alabama**, 287 U.S. 45, 53, 53 S. Ct. 55, 58 (1932).

The courts have consistently held that the right to choose one's own counsel is an essential component of the sixth amendment. **Crocker v. California**, 357 U.S. 433, 439, 78 S. Ct. 1287, 1291 (1958); **United States v. Burton**, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); **United States v. Kinitz**, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); **United States v. Johnston**, 318 F.2d 288, 291 (6th Cir. 1963); **Releford v. United States**, 288 F.2d 298, 301 (9th Cir. 1961). Were a defendant not provided an opportunity to select his own legal representative, substantial risk would arise that the basic trust between counsel and client, which is the cornerstone of our adversary system, would be undercut. **United States v. McMann**, 252 F. Supp. 539, 545 (N.D. N.Y. 1966), *aff'd*, 386 F.2d 611 (2nd Cir. 1968), *cert. denied*, 390 U.S. 958 (1968).

The right to choose counsel carries with it the right to have the same attorney throughout the proceedings. Most of the cases in this area arise, as has the petitioner's, because the trial court failed to grant a continuance by defense counsel, and, thereafter, another attorney represented the defendant at trial, which usually takes place very shortly after the continuance request has been denied. Although relief appears to be rarely granted, nonetheless the principle has been clearly established that the court, acting in the name of calendar control, cannot arbitrarily and unreasonably interfere with the client's right to continue to be represented by the attorney whom he has selected. **United States v. Burton**, *supra* at 489; **Giacalone v. Lucas**, 445 F.2d 1238, 1240 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); **United States ex rel Carey v. Rundle**, 409 F.2d 1210, 1215 (3rd Cir. 1969).

On the other hand, the right to be represented by one's chosen attorney cannot be demanded or implemented in a fashion which leads to unreasonable burdens upon the court. **United States v. Ostrer**, 597

F.2d 337, 341 (2nd Cir. 1979); **United States v. Burton,** *supra* at 490; **Giacalone v. Lucas,** *supra* at 1240.

The most frequently encountered limitation imposed by the courts upon the right to be represented by chosen counsel occurs when the trial court determines that the right is being manipulated to delay the trial. **United States v. Barrentine,** 591 F.2d 1069, 1074 (5th Cir. 1979), *cert. denied,* _____U.S. _____, 100 S. Ct. 521 (1979); **United States v. Bentvena,** *supra* at 936. These cases show that, if a court determines that delay will occur, and that it will cause prejudice to the prosecution or create difficulties for the court, it may intrude into the attorney-client relationship by denying a defendants' request for a continuance. In reviewing claims similar to the petitioner's claim in the instant case, the Sixth Circuit has said:

> Proper exercise of . . . discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice. On the one hand, a court may not insist upon expeditiousness for its own sake, but, on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is a reasonable delay varies depending upon all the surrounding facts and circumstances. **Giacalone v. Lucas,** *supra* at 1240.

To determine whether in light of the totality of the circumstances a particular period of delay, and the request therefore, are reasonable, the Court has stated:

> Some of the factors to be considered in the determination of reasonableness are: the length of the delay requested;

> whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory, and other relevant factors. *Id.*

Before examining the issues in light of the record in the instant case, it should be noted that decision of this aspect of this case is not governed by the rule of **Ungar v. Sarafite**, 376 U.S. 575, 589, 84 S. Ct. 841, 849 (1964), that the decision to grant or deny a request for a continuance is left to the sound discretion of the trial court. Cases in which **Ungar** is applied typically involve denials of requests for continuances where the period between arraignment (or the first appearance of counsel) and trial has been quite short, and counsel, after having his continuance denied, continues to represent the defendant. In such cases, a high burden is placed on the defendant to show that he was deprived of his right to a fair trial and adequate representation. *Cf.* **Price v. Perini**, 520 F.2d 807, 808 (6th Cir. 1975).

Where the denial of the continuance leads to a loss by the defendant of his chosen attorney, another factor is added, and resolution of the constitutional issues cannot be reached merely by citing **Ungar**. Instead, the reasonableness of the delay is per se called into question by the fact of counsel's departure from the case. In such cases, the burden should be on the state to show that the denial of the request for a continuance was reasonable, rather than the burden being on the defendant to show that it was unreasonable. This allocation of the burdens of persuasion acknowledges the constitutional significance of the added factor which arises when a defendant's chosen attorney is unable to represent him as a result of the denial of his request for a continuance.

In other words, where counsel continued to represent the defendant, the burden remains on him to establish both that the denial of the continuance was unreasonable, and that he was prejudiced thereby. Where, however, such denial leads to counsel's withdrawal, as here, the defendant's initial burden is satisfied upon a showing of that sequence of events. Then the state must show that the court's refusal to grant the continuance was reasonable in light of all the circumstances. If the state fails to meet this burden, then the defendant must proceed further to show that he was prejudiced. If the state meets its burden of showing that the denial of the requested continuance was reasonable, then the inquiry is concluded, and no relief can be granted to the defendant, despite the fact that a different attorney represented him at trial.

Viewing the record from this perspective, it appears that the state has not met its burden of showing that the denial of the continuance was reasonable in light of the factors to be considered under **Giacalone**, *supra*. The continuance was requested at the defendant's arraignment on a five count indictment: no other continuances had previously been requested. The period of additional delay sought, some two weeks, was short. No additional burden would have been imposed upon the witnesses, who would not have been required to make additional appearances. Nor does it appear that the state's case would have been weakened or an additional burden imposed upon the prosecutor by the passage of the short period of time sought by the request for the continuance. The delay appears to have been sought for a legitimate reason – namely, to enable counsel to prepare adequately for trial. Whether or not counsel had a conflicting engagement in another court, his representation that he could not prepare for trial in the ten day period allotted to him by the trial judge appears to have been neither dilatory in purpose nor unreasonable.

Thus, the primary justification offered by the state in support of its contention that the denial of the con-

tinuance was reasonable is the inconvenience that would have been caused to the court in managing its calendar. The record indicates that the court was following its customary practice in scheduling the trial for ten days after the arraignment (Arraignment Tr. at 7). In addition to the appearance of "expeditiousness for its own sake", criticized in **Giacalone**, *supra* at 1240, the court's action does not appear to have been compelled by any urgent necessity to manage its calendar. When held, this trial lasted only two days. It was not a protracted or complicated proceeding, the rescheduling of which would have had a domino effect on the balance of the court's docket. The court did not indicate that a continuance to the time requested by counsel would have necessitated shifting other pending matters. Rather, according to the record, it was following its customary practice of assigning prompt trial dates. Other than causing the court to deviate from this practice in this case, no other adverse impact on the court's operations has been suggested by the record or the state. Nor does it appear that the state's desire to implement its Career Criminal Program would have been significantly frustrated by the short delay sought by counsel at this early stage of the proceeding.

Thus, applying the totality of the circumstances standard of **Giacalone** to the record in this case, it appears that the state has not met its burden of showing that the denial of the continuance, which denial led to withdrawal of petitioner's chosen counsel, was reasonable. Therefore, under **Giacalone**, the petitioner has established a denial of his constitutional right to be represented by counsel of his choice.

This does not, however, automatically entitle the petitioner to relief. The sixth Circuit's decision in **Giacalone** indicates that he must still establish that he was prejudiced as a result of the impermissible intrusion by the trial judge into his sixth amendment right. Although the Court in its earlier opinion in **United States v. Johnson**, *supra* at 291, indicated that prejudice need

not be shown, the more recent **Giacalone** opinion refers to the "real issue" as being whether the defendant received adequate and competent representation from substituted counsel and a fair trial. 445 F.2d at 1243. According to the Court in **Giacalone**, "Due process requires no more." *Id.* As in other contexts in a habeas corpus proceeding, **Harned v. Henderson**, 588 F.2d 12, 22 (2nd Cir. 1978); **Dodge v. Johnson**, 471 F.2d 1249, 1251 (6th Cir. 1973), *cert. denied*, 412 U.S. 931 (1973); **Allen v. Perini**, 424 F.2d 134, 138 (6th Cir. 1970), *cert. denied*, 400 U.S. 906 (1970), the burden of establishing such prejudice is on the petitioner. I find, for the reasons expressed in Section D, *infra*, that a review of the entire record before this court leads to the conclusion that petitioner has not met his burden of establishing that either he received inadequate representation or that his trial was not fair.

C. Denial of the Right to Effective Assistance of Counsel As a result of the Denial of Adequate Time to Prepare

For his second claim for relief, the petitioner states that he was deprived of his right to effective assistance of counsel because the trial court's refusal to grant a continuance of the trial date deprived his attorney of the opportunity to prepare for trial. Cases decided by the Sixth Circuit presenting similar claims require that the second ground of the petition be denied.

In **Stidham v. Wingo**, 482 F.2d 817, 820 (6th Cir. 1973), the court stated that late appointment of counsel is not per se a violation of the constitutional right to effective representation, and that the issue must be determined in light of all the facts and circumstances. In **Price v. Perini**, 520 F.2d 807, 808 (6th Cir. 1975), the court refused to overrule its language in Stidham, and dismissed the petition because the petitioner had failed to show that there was "any evidence which trial counsel

failed to introduce, any important witness whom he failed to call or any arguments he was prevented from making." Thus, it is clear that allowance of only a short period of time between counsel's first appearance in the case and the trial will not entitle petitioner to relief unless the petitioner can show that he was prejudiced. **Callahan v. Russell**, 423 F.2d 450, 454 (6th Cir. 1970). Even where the time period between first appearance and trial has been as short as it was in this case, or shorter, courts have not found a defendant to have been per se prejudiced by the amount of time available to prepare for trial. *See, e.g., id.* at 454 n.3. Thus, with reference to this claim, entitlement to relief depends, as it does with reference to his other claim, on the question of whether petitioner has shown that he was prejudiced.

D. Petitioner Has Not Shown That He Was Prejudiced by the Trial Court's Actions

To evaluate the extent to which petitioner may have been prejudiced by the trial court's actions this court must look at two factors: what happened at the trial, and, as well, what might have happened, had petitioner's counsel had more time to prepare for the trial.

A close review of the trial transcript makes clear that petitioner enjoyed the benefit of experienced and competent counsel. The two basic problems which confronted the attorney, the youthfulness of the complaining witness and the determination that his client would not testify would have posed formidable problems for any attorney defending the charges which were facing his client. The transcript shows that, despite these problems, the attorney conducted a vigorous and skillful defense on behalf of his client. There is nothing in the record of the trial proceedings that can support a claim that petitioner was in any way prejudiced by his attorney's performance in the courtroom.

Petitioner's claim of prejudice must, therefore, stand or fall on the strength of his showing of what might have happened at trial, had either of his attorneys (Mr. Fanelly, who was forced to withdraw, or Mr. Bulford, the substitute attorney) been successful in the attempt to secure more time to prepare for trial. Any such hypothetical reconstruction of events that might have transpired is always a difficult task, and one which will often be impossible for a confined prisoner who seeks to show what might have occurred after the passage of a considerable period of time. Here, as in **Price v. Perini,** *supra,* petitioner's effort hs been unsuccessful: the evidence offered by the petitioner, namely the affidavit of his trial attorney, fails to show that he was foreclosed from offering any evidence, producing any witnesses, or advancing any defense as a result of the shortness of time in which to prepare for trial. Mr. Fanelly's affidavit is similarly unspecific and expresses simply that more time to prepare might have been desirable.

The trial attorney's affidavit relates unsuccessful efforts to locate witnesses who could have testified as to the complainant's condition on the date the incident occurred. There is no suggestion, however, that had such witnesses been located, their testimony would have been favorable to the petitioner. In addition, efforts to probe the complainant's "family background" are described, with an indication that, after trial, some information was developed in this regard. No showing is made, however, of the exact nature of the information developed after the trial or that such information would have been beneficial to the defense at trial. It should also be noted that no representation was made in the motion for a new trial which was filed on the petitioner's behalf that additional, named witnesses were available to support the defense theory of the case. Had such witnesses been uncovered and identified at that time, then the showing of prejudice would be far greater.

The conclusion that petitioner's showing of prejudice is insufficient is not altered by the apparent fact that he

successfully passed a polygraph examination. Neither the examination nor its results have been submitted to this court, and, in any event, the examination, even if available prior to trial, would not have been admissible absent the safequards outlined in **State v. Souel**, 53 Ohio St. 2d 123, 132, 372 N.E.2d 1318 (1978). *See also* **State v. Levert**, 58 Ohio St. 2d 215, 389 N.E.2d 848 (1979); **State v. Smith**, 50 Ohio App. 183, 197, 362 N.E.2d 1239, 1248 (1976). Nor has the allegation been made in this court that the petitioner's decision not to take the stand was influenced by the lack of other witnesses or evidence.

Petitioner's attorney contends that he might have been able to secure a more favorable plea-bargain concerning his sentence, had he had more time in which to negotiate. There being no constitutional right to receive favorable consideration from a plea-bargain, **Weatherford v. Bursey**, 429 U.S. 545, 561, 97 S. Ct. 837, 846 (1976), or otherwise, petitioner's claim that more time would have improved his bargaining posture does not establish prejudice as a result of the original actions of the state trial judge.

Thus the petitioner has not met his burden of establishing prejudice as a result of either the trial court's deprivation of his right to representation by counsel of his choice or its denial of more time to his substitute counsel in which to prepare for trial. The transcript shows that the trial which he received was fair. And he has not shown that the trial which he might have received would have been substantially different, had more time been available to his attorney.

Therefore, for the foregoing reasons, I find that petitioner has not met his burden of establishing that he was prejudiced by the actions of the trial court, and it is

RECOMMENDED that the petition for writ of habeas corpus be dismissed.

/s/ James G. Carr
United States Magistrate

Toledo, Ohio
September 19, 1980

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on 9-22-80.

/s/ James S. Gallas
Clerk

MR. FANELLY: If it please Your Honor, on behalf of the Defendant, we wish to acknowledge receipt of the Indictment; that he has read and fully understands the same; waives the reading thereof and any defect thereon and respectfully ask the same bond continue.

THE COURT: Mr. Linton, have you read this Indictment?

DEFENDANT LINTON: Yes, I have.

THE COURT: Have you, do you understand that?

DEFENDANT LINTON: Yes.

THE COURT: Do you wish the Court to read it to you?

DEFENDANT LINTON: No. That won't be necessary.

THE COURT: To these charges your attorney has entered a plea of not guilty for you. Is that your desire?

DEFENDANT LINTON: Yes.

THE COURT: You are out on bond?

DEFENDANT LINTON: Yes.

THE COURT: When do you want this set?

MR. ZUCH: As soon as possible, Your Honor, for pretrial and trial.

THE COURT: Do you have the time to pretry it this morning?

MR. ZUCH: Yes, we can pretry it this morning.

THE COURT: Why don't you go ahead and pretry it and then I will get a date.

MR. FANELLY: Your Honor, I am not in a position to pretry this today. I haven't even filed my motion for discovery.

THE COURT: He is going to give it to you right now.

MR. ZUCH: Yes.

MR. FANELLY: I have other things to do, Your Honor. I have got another matter I have got to attend. I have got people in the office at 10:00 o'clock.

MR. ZUCH: Maybe we can do it in the middle of the week.

MR. FANELLY: How about the pretrial next Monday morning, a week from today. The 15th, Judge; is that all right?

THE COURT: We will have this case pretried next Monday morning at 9:00 a.m. and set the trial date down for the 18th at 9:00 a.m.

MR. FANELLY: I'm sorry, Your Honor. I am not available.

THE COURT: You can have the 18th or the 19th. The Court is free.

MR. FANELLY: I have other matters that week, Judge, and wouldn't be available til the first week of June.

THE COURT: Except for one thing. The law says that criminal cases shall have priority. The Court will give you the 18th or the 19th. That is the only two days that I have.

MR. FANELLY: Well, then, I will withdraw from this case. He can hire someone else. No way I can get ready in two weeks' time. You can either appoint someone else or he can hire someone else. No way I can.

THE COURT: Are you addressing the Court; Just stand up here til I make a ruling. We are not playing to the gallery.

MR. FANELLY: I'm sorry.

THE COURT: You may withdraw any time you want to. This Court runs this court room in accordance with the law and in accordance with procedure. You or any other attorney may not like it.

The Court will allow you to withdraw and instructs you (indicating) to get your own lawyer and he will be ready to go on the 18th of May.

DEFENDANT LINTON: Your Honor, can I – –

THE COURT: Yes.

DEFENDANT LINTON: I cannot retain another lawye.. I have just managed to get out on bail with my parents' help and everything, and – –

MR. FANELLY: Excuse me. I haven't been paid anything up to this point.

THE COURT: I understand that. The Court is not concerned about payment. If you want to withdraw you have a right to withdraw.

DEFENDANT LINTON: But that is forcing me to retain a new lawyer. I have been out on bond. I have been pulled back in. Bond was raised. I feel persecuted. I am not saying I am, but – –

THE COURT: No. The Court is giving you, here is the situation; if you are not guilty of anything, the best way to prove your innocence is to get to trial immediately so that the world will know you are not guilty.

DEFENDANT LINTON: But I don't have the time. I have to pay this man something. I am working and I am paying my paychecks, when I get it. I haven't even given him the first retainer yet, and I am doing the best I can.

THE COURT: He has asked to withdraw.

DEFENDANT LINTON: He is being forced to withdraw.

THE COURT: Nobody is forcing him to withdraw. He is withdrawing of his own volition.

DEFENDANT LINTON: Okay.

THE COURT: I don't make any exceptions for this case. Every case I get, I set it for ten days at the time of the arraignment and you are no different from anybody else and I am giving you two weeks.

Now, if Mr. Fanelly wants to withdraw this is his perogative, but you be ready to go next Monday for the pretrial at 9:00 a.m. and number two, you will go to trial on the 18th. Now, the rest is up to you.

Next case.

— — —

(Later that same morning:)

MR. SLOAN: May it please the Court, I believe the only remaining matter that we have before the Court is getting the Defendant Linton an attorney. That concludes the rest of the call day.

IN THE

COURT OF APPEALS

NINTH JUDICIAL DISTRICT

C. A. No. 8939

STATE OF OHIO)
) ss:
SUMMIT COUNTY)

STATE OF OHIO

Plaintiff-Appellee

v.

JACK L. LINTON

Defendant-Appellant

APPEAL FROM JUDGMENT ENTERED IN THE
COMMON PLEAS COURT
SUMMIT COUNTY, OHIO
CASE NO. 78 5 508

DECISION AND JOURNAL ENTRY

Dated: December 29, 1978

This cause was heard November 13, 1978, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, P. J.

The defendant, Jack L. Linton, appeals his conviction for kidnapping and three counts of rape. We affirm.

FACTS

The victim, 16 year old Kathy Musgrave, testified that on April 25, 1978, she was abducted in an auto and forcibly raped by the defendant and George Emmett Rusk. The defendant was arrested April 29, released on bond, and retained private counsel, Angelo Fanelly.

The prosecutor apparently considered the defendant eligible for the Career Criminal Program. The defendant was secretly indicted on May 3, prior to a scheduled preliminary hearing in municipal court. Defendant was arraigned on May 8 and pled not guilty to all counts. At the arraignment, the following colloquy occurred between the court, counsel, and the defendant:

"* * *."

"THE COURT: When do you want this set?

MR. ZUCH: As soon as possible, Your Honor, for pretrial and trial.

THE COURT: Do you have the time to pretry it this morning?

MR. ZUCH: Yes, we can pretry it this morning.

THE COURT: Why don't you go ahead and pretry it and then I will get a date.

MR. FANELLY: Your Honor, I am not in a position to pretry this today. I haven't even filed my motion for discovery.

THE COURT: He is going to give it to you right now.

MR. ZUCH: Yes.

MR. FANELLY: I have other thing to do, Your Honor. I have got another matter I have got to attend. I have got people in the office at 10:00 o'clock.

MR. ZUCH: Maybe we can do it in the middle of the week.

MR. FANELLY: How about the pretrial next Monday morning, a week from today. The 15th, Judge; is that all right?

THE COURT: We will have this case pretried next Monday morning at 9:00 a.m. and set the trial date down for the 18th at 9:00 a.m.

MR. FANELLY: I'm sorry, Your Honor. I am not available.

THE COURT: You can have the 18th or the 19th. The Court is free.

MR. FANELLY: I have other matters that week, Judge, and wouldn't be available til the first week of June.

THE COURT: Except for one thing. The law says that criminal cases shall have priority. The Court will give you the 18th or the 19th. That is the only two days that I have.

MR. FANELLY: Well, then, I will withdraw from this case. He can hire someone else. No way I can get ready in two weeks' time. You can either appoint someone else or he can hire someone else. No way I can.

THE COURT: Are you addressing the Court? Just stand up here til I make a ruling. We are not playing to the gallery.

MR. FANELLY: I'm sorry.

THE COURT: You may withdraw any time you want to. This Court runs this court room in accordance with procedure. You or any other attorney may not like it.

The Court will allow you to withdraw and instructs you (indicating) to get your own lawyer and he will be ready to go on the 18th of May.

DEFENDANT LINTON: Your Honor, can I — —

THE COURT: Yes.

DEFENDANT LINTON: I cannot retain another lawyer. I have just managed to get out on bail with my parents' help and everything, and — —

MR. FANELLY: Excuse me. I haven't been paid anything up to this point.

THE COURT: I understand that. The Court is not concerned about payment. If you want to withdraw you have a right to withdraw.

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DEFENDANT LINTON: But I don't have the time. I have to pay this man something. I am working and I am paying my paychecks, when I get it. I haven't even given him the first retainer yet, and I am doing the best I can.

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DEFENDANT LINTON: He is being forced to withdraw.

THE COURT: Nobody is forcing him to withdraw. He is withdrawing of his own volition.

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Next case.

— — —

(LATER that same morning:)

MR. SLOAN: May it please the Court, I believe the only remaining matter that we have before the Court is getting the Defendant Linton an attorney. That concludes the rest of the call day.

THE COURT: I am now in the process of calling attorneys right now. We will know in a few minutes.

DEFENDANT LINTON: I am facing five life sentences on these charges. Why am I only given ten days to defend my case? You know – –

THE COURT: Let me have the file.

DEFENDANT LINTON: It is evident that I need a good lawyer.

THE COURT: I can't hear you.

DEFENDANT LINTON: It is evident by the charges that I am in need of a good lawyer.

THE COURT: There is no question about that.

DEFENDANT LINTON: Five life sentences. Ten days to prepare a trial is not very much.

THE COURT: The crime was committed on April 21st.

DEFENDANT LINTON: I have been in jail twice over this charge. I put up five thousand dollars bond. I was let out. They put me back in jail. I was put back on twenty thousand dollar bond.

> I haven't even had time to talk to my attorney. I work. I cannot miss a day's work. I will be fired because of this charge. I have missed about four days due to it.
>
> THE COURT: I will discuss this with your attorney in a few minutes."

Attorney Robert Bulford was appointed that same morning as counsel for the defendant. The pre-trial was conducted, and the trial was scheduled for May 19.

On May 18, Attorney Bulford filed written motions requesting a psychiatric examination for the defendant, a continuance to prepare for trial and for a separate trial, and a motion in limine.

On May 19, counsel appeared but the trial court was unable to proceed because of an ongoing trial. The court overruled the motions for a continuance and separate trials but granted the motion in limine. At the conclusion of his argument on the motion for a continuance, defense counsel stated that he was "prepared to go forward."

Trial commenced on May 22 and verdicts of guilty were returned on May 23. Neither the defendant nor Rusk testified.

ASSIGNMENTS OF ERROR

> "1. The Trial Court's actions of setting the matter for Trial just eleven days after arraignment and denying Defendant-Appellant's request for a Trial during the first week of June, 1978, denied Defendant-Appellant of his right to be represented by the retained counsel of his choice and thus denied him of due process of law.

"2. The Defendant was denied the effective assistance of counsel in that Trial was set only twelve days after counsel was appointed and the Court failed to grant a reasonable continuance.

"3. The verdict is against the manifest weight of the evidence.

"4. The Trial Court's demand of Defendant's Motion for a new Trial was an abuse of discretion."

DISCUSSION

Defense counsel argues in his brief that:

"***The lower Court has lost sight of the fact that the speedy Trial provisions exist to protect the interests of the accused and are not to be used to justify rushing Defendants through Trial like cattle going to the slaughter house."

"***."

Counsel further argued that while he did say on May 19 that he was prepared to go forward, he did so "because it was obvious that no meaningful continuance would be granted and he was forced to prepare as adequately as possible under the circumstances."

Neither the law of Ohio nor the federal constitution guarantees to any defendant the right to be represented by counsel of his own choice. He is, however, guaranteed the right to have the effective assistance of counsel. As a general proposition, a court should permit a defendant reasonable opportunity to make satisfactory arrangements with retained counsel. However, we do not

believe that this extends to the allowance of a sufficient lapse of time for the defendant to work and/or raise money to pay counsel.

The burden is upon the movant to show the court abused its discretion in denying the continuance and/or that the denial prejudicially affected his assistance by counsel so as to deny him a fair trial.

We concur with the defendant's argument that the broad interests of justice would have been served better by the granting of a continuance to Attorney Fanelly until the first week of June. Nevertheless, the defendant cannot demonstrate any prejudice, such as a denial of discovery, unavailability of witnesses, or a lack of investigation. We do not consider the lack of a polygraph examination is prejudicial even if it were admissible by stipulation. Additionally, Mr. Fanelly offered no reasons for his unavailability, such as a prior scheduled criminal trial in another court. We cannot say as a matter of law that 14 days is an insufficient amount of time to prepare for a four-count felony trial. Our review of the record reveals that substantial justice was done, and that Mr. Bulford afforded the defendant very effective assistance at a fair trial. We find that the jury's verdicts are supported by credible, reliable, probative testimony.

The court properly overruled the defendant's motion for a new trial. The post trial results of a polygraph examination are not "newly discovered evidence" and cannot be made so by stipulation with the prosecutor. The defendant got a hearing in which the court "considered" the polygraph and defendant was given unsupervised probation on two charges. That is what he contracted for and got in the questionable "post trial" bargain.

SUMMARY

We overrule all four assignments of error and affirm the judgments.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Summit County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ Edward J. Mahoney
Presiding Judge
– for the Court –

BELL, J.
HUNSICKER, J.
CONCUR

(Hunsicker, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, Section 6(C), Constitution).

APPEARANCES:

STEPHAN M. GABALAC, Summit County Prosecutor (Appellate Review Division), City-County Safety Building, 53 East Center Street, Akron, OH 44308 for Plaintiff-Appellee.
ROBERT E. BULFORD, Attorney at Law, 800 Centran Building, Akron, OH 44308 for Defendant-Appellant.

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

OCTOBER TERM 1981

E. P. PERINI, Superintendent, Marion Correctional Institution

Petitioner,

vs

Case No. 81-794

JACK L. LINTON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH S. DEUTSCHLE, JR.
COUNSEL OF RECORD
Member of the Supreme Court Bar
Assistant Public Defender

ELIZABETH MANTON
Assistant Public Defender

RANDALL M. DANA
Ohio Public Defender
Ohio Public Defender Commission
20 East Broad Street
Columbus, Ohio 43215
(614) 466-5394

and

CHARLES A. THOMPSON
Director of Clinical Programs

DAVID E. FREEL
Supervising Attorney
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821

COUNSEL FOR RESPONDENTS

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QUESTION PRESENTED

WAS IT ERROR FOR THE COURT BELOW TO APPLY A TOTALITY OF THE CIRCUMSTANCES TEST IN FINDING A CONSTITUTIONAL VIOLATION WHEN THE STATE TRIAL JUDGE ARBITRARILY DENIED A REASONABLE CONTINUANCE THE EFFECT OF WHICH WAS TO FORCE RESPONDENT'S RETAINED COUNSEL TO WITHDRAW FROM THE CASE?

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STATEMENT OF THE CASE

The facts as stated in the opinion of the United States Court of Appeals for the Sixth Circuit attached in Petitioner's Appendix A-1 at pages A-1 through A-3 sufficiently and succinctly set forth the posture of the case before this Court.

ARGUMENT

The decision below of the Sixth Circuit Court of Appeals presents no novel issue. That courts' decision enunciated no new rule of law and did not, as represented by Petitioner, adopt a per se rule. In effect, this case represents merely an attempt by petitioner to have this case reviewed on its merits a second time.

The court below applied a totality of the circumstances test to determine that the state trial judge abused his discretion by excluding respondent's retained counsel from participating in the trial by unreasonably and arbitrarily forcing this case to an early trial. The Court of Appeals concluded that Respondent was denied his Sixth Amendment right to retained counsel of his choice but repeatedly recognized that such right is not absolute. In each instance the particular facts and circumstances of the case must be considered in balancing the trial court's discretionary power to deny continuances and manage its docket with the Sixth Amendment right to retained counsel of choice. The totality of the circumstances test utilized by the Sixth Circuit in this situation has been implicitly recognized by this Court in Ungar v. Sarafite, 376 U.S. 575 (1964). This test, although not always explicitly stated, has been repeatedly used and uniformly applied by lower federal courts since that decision. See, e.g., United States ex rel. Cary v. Rundle, 409 F.2d 1210 (3rd Cir. 1969); United States v. Burton, 584 F.2d 485 (D. C. Cir. 1978), cert. denied 439 U.S. 1069 (1979); United States v. Inman, 483 F.2d 738 (4th Cir. 1973); United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963).

In Ungar v. Sarafite, supra, the petitioner, Ungar, was a lawyer charged with contempt. He obtained two continuances to engage counsel. When the case was again called Ungar appeared with retained counsel who informed the court that he would represent Ungar only if he could obtain a third continuance to familiarize himself with the case. The court denied the

continuance request, counsel withdrew and Ungar represented himself. This Court held that under the totality of the circumstances Ungar was not denied due process of law.

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.
> 376 U.S. at 589.

The significant factors present in Ungar noted by the court included the facts that Ungar himself was a lawyer, he had been granted two prior continuances to obtain counsel, the issues in the contempt proceeding were clear-cut and the evidence readily available to him, the motion for continuance was not made until the day of trial, and there were no indications that Ungar was unable to produce pertinent evidence by reason of the denial of continuance.

The court below applied a similar totality of circumstances test to determine that the state trial judge abused his discretion. The Court recognized that the constitutional right to counsel includes the right to retain counsel of choice so long as that right does not unreasonably interfere with the normal progress of a case, see e.g., Powell v. Alabama, 287 U.S. 45 (1932); Chandler v. Fretag, 348 U.S. 3 (1954), and that this right is grounded upon significant policy considerations:

> The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is the cornerstone of the adversary system would be undercut.
> (Petitioner Appendix at A-3, hereinafter Pet. Appen.)

This policy is also recognized by commentators. See Comment, An Examination of the Sixth Amendment Right to Choose Retained Counsel, 60 Iowa L. Rev. 328, 331 (1974) (a successful attorney-client relationship involves mutual respect, communication and confidentiality). Just as a defendant may not be forced to accept any representation by appointed counsel (Faretta v. California, 422 U.S. 806 (1975)), a defendant cannot be forced to accept appointed counsel in lieu of a reasonable opportunity to secure retained counsel of choice. Undesirable results would obtain if our system were restructured to permit only the right to an appointed counsel paid by the government. These policy

considerations were factored into the totality of the circumstances test applied by the Court below.

The Court below also considered the fact that the right to effective counsel includes the right to an adequate time to prepare a defense. Powell v. Alabama, supra, and that the state trial judge unreasonably and arbitrarily demanded a trial date only 10 days after arraignment. While a ten day period may not alone always constitute a constitutional violation, it is certainly an important factor in the totality of the circumstances test, especially when trial counsel was unable to undertake what may have been vital preparation. The Court of Appeals noted that:

> In the instant case, defendant was forced to go to trial with an attorney appointed by the court after he had been able to retain his own attorney who could not prepare the case in the ten days allowed by the trial court. The criminal case involved five serious felony counts and the basic issue was the credibility of the witnesses.
>
> Where, as in this case, there is no guilty plea, no disinterested eye witness to the defendant's crimes, and no confession, the determination of guilt or innocence will hinge largely upon the credibility of the complaining witness. In order for an attorney to properly investigate an alleged rape and kidnapping under these circumstances, the complainant's background must be explored and the statements of persons with whom she discussed the alleged crimes shortly after their occurrence obtained.
>
> Defendant's appointed counsel admits that he was not able to thoroughly investigate the background of the prosecutrix and did not interview several potential witnesses. The only defense presented at trial was that of consent. In light of these facts, the Court doubts that the 10 days or 14 days afforded here were adequate. To say that appellant's attorney's modest request for more time to investigate a very serious felony case was dilatory is to stretch credulity. (Pet. Append. A-10)

Again, while the lack of preparation alone may not rise to the level of a constitutional violation, it is a significant factor in the totality of circumstances test. At the least the record suggests that Respondent might well have been denied a fair opportunity to obtain critical evidence.

Other significant factors considered by the court below included the fact that unlike Ungar, Respondent was not a lawyer, was charged with five serious felonies, and was unable to fend for himself. Unlike Ungar,

Respondent had not previously asked for or obtained a continuance. Retained counsel only requested an additional two or three weeks to prepare the case, not an unreasonable request in light of the number and seriousness of the charges. And finally, a very significant factor was that the trial judge expressed no reasonable justification for disallowing a reasonable continuance request. The Court of Appeals observed:

> Here, it is clear that the state trial judge acted unreasonably and arbitrarily in setting the case for trial 10 days after the arraignment, over the protest of appellant's attorney that he needed more time to prepare for the trial of these serious charges. All the lawyer asked for was a short adjournment of two or three weeks to properly prepare, and to arrange his own calendar. Defendant's retained counsel had not received any prior continuances and nothing in the record indicates that the requested continuance involved a scheme to delay the trial. There was no showing of inconvenience to the witnesses, opposing counsel, or the court. The length of the requested delay was not unreasonable. Moreover, as noted above, the case involves five serious felony counts, four for rape and one for kidnapping. Under these circumstances, counsel's request was reasonable, and in denying it and forcing appellant's retained counsel to withdraw, the trial judge violated the Sixth Amendment right to appellant to retain counsel of his own choosing.
>
> This Court, of course, recognizes the importance of docket control and the necessity that trial judges keep a firm hand in controlling their dockets. Nothing in this opinion should be construed to suggest otherwise. But on the other hand such docket control must not be exercised in an arbitrary manner so as to deny a defendant the right to have his own retained counsel. (Pet. Append. A-11).

The record of the trial proceedings presents the picture of a grossly arbitrary and unreasonable trial judge who, for reasons not appearing of record, was consumed by a desire for immediate trial of this case. On the very morning of arraignment, when retained counsel had first appeared, the judge wanted to conduct a pretrial conference. (Pet. Append. A-28) Retained counsel objected since he had engaged in no investigation or discovery. Immediately thereafter, the judge set the trial date ten days hence and refused to extend the date for two or three weeks to allow retained counsel to remain on the case. The following colloquy clearly reflects the arbitrary and unreasonable attitude of the trial judge, and his total indifference to Respondents' rights:

DEFENDANT LINTON: But that is forcing me to retain a new layer. I have been out on bond. I have been pulled back in. Bond was raised. I feel persecuted. I am not saying I am, but --

THE COURT: No. The Court is giving you, here is the situation; if you are not guilty of anything, the best way to prove your innocence is to get to trial immediately so that the world will know you are not guilty.

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THE COURT: Nobody is forcing him to withdraw. He is withdrawing of his own volition.

DEFENDANT LINTON: Okay.

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Now, if Mr. Fanelly wants to withdraw that is he prerogative, but you be ready to get next Monday for the pretrial at 9:00 a.m. and number two, you will go to trial on the 18th. Now, the rest is up to you.

Next case.

(Pet. Append, A-30,31)

In summary, the court below applied a totality of circumstances test and found an abuse of discretion by the state trial judge. It is a mischaracterization for Petitioner to claim that the court below applied a per se rule. This case simply does not present an issue that this Court should hear.

Respectfully submitted,

JOSEPH S. DEUTSCHLE, JR.
Counsel of Record
Member of the Supreme Court Bar
Assistant Public Defender

ELIZABETH MANTON
Assistant Public Defender

RANDALL M. DANA
Ohio Public Defender
Ohio Public Defender Commission
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Supervising Attorney
Clinical Programs
The Ohio State University
College of Law
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COUNSEL FOR RESPONDENTS

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IN THE

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OCTOBER TERM, 1981

E. P. PERINI, Superintendent
Marion Correctional Institute,

Petitioner,

vs.

Case No. 81-794

JACK L. LINTON,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF OHIO,
COUNTY OF MARION, SS:-

I, Jack L. Linton, being duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my Motion for Leave to Proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security thereof.

I further swear that the responses which I have made below relating to my ability to pay the cost of responding to this action are true:

1. I am presently unemployed because I am incarcerated in the Marion Correctional Institute, Marion, Ohio, and have been since 1978.

2. In the past twelve (12) months I have not received any income from employment, rent, dividends, interest,

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pensions, annuities, life insurance payments, gifts or inheritance, or any other source.

3. I have no funds with which to pay for fees or costs of this proceeding and due to my incarceration I have no way to raise such funds. I have no bank accounts.

4. I have no assets other than personal effects.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Jack L. Linton

JACK L. LINTON
Inmate No. 151-971
Marion Correctional Institute
P. O. Box 57
Marion, Ohio 43302

Subscribed and sworn to before me, an officer duly authorized to administer oaths, this 2nd day of Nov., 1981.

Blaine G. Hummel

Notary Public

BLAINE G. HUMMEL, JR. Notary Public
State of Ohio
My Commission Expires May 25, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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E. P. PERINI, Superintendent, Marion Correctional Institution

Petitioner,

vs

Case No. 81-794

JACK L. LINTON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

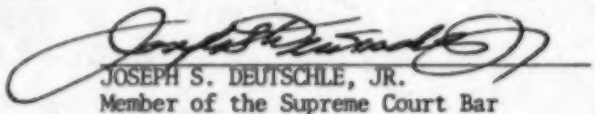
Petitioner, Jack L. Linton, by and through his attorneys, move this court, pursuant to Supreme Court Rule 46, Section 1, for leave to proceed in forma pauperis for the reasons stated in the attached affidavit submitted in lieu of a memorandum. Leave to proceed in forma pauperis was requested and granted by the United States District Court for The Northern District of Ohio, Western Division, and the case proceeded in forma pauperis in the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOSEPH S. DEUTSCHLE, JR.
Member of the Supreme Court of Ohio
Counsel of Record
Assistant Public Defender
Ohio Public Defender Commission
20 East Broad Street
Columbus, Ohio 43215
(614) 466-5394

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion For Leave To Proceed In Forma Pauperis has been served on respondent, through his attorney and counsel of record, Richard David Drake, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 by United States mail, certified, postage prepaid, this 12th day of November, 1981. I further certify that all parties required to be served have been served.



JOSEPH S. DEUTSCHLE, JR.
Member of the Supreme Court Bar
Counsel of Record
Attorney for Respondent